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Accessory liability of a solicitor for losses caused by a client's fraud

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The duty of confidentiality incumbent on solicitors in respect of their clients' affairs is well known, and is narrated in both the Code of Conduct published by the Solicitors' Regulation Authority and in the Rules relating to the conduct of solicitors published by the Law Society of Scotland. The relevant rules embodied in each instrument neither require nor permit a solicitor who discovers that a client has been engaging in criminal conduct to communicate this to a third party (or their legal agent) who may be adversely affected by such criminal conduct: on the contrary, the English Code of Conduct provides for no exception to the duty of confidentiality in relation to knowledge of criminal conduct, and the Scottish rule makes an exception only in relation to circumstances where a client indicates that he or she will commit a crime in the future (thus apparently excluding cases of the communication of past criminal acts from the exception). However, despite there being no indication of this exception in these rules, the duty of confidentiality does not extend to circumstances where fraud or some other illegal act is alleged against a party whose law agent has been directly concerned in the carrying out of the very transaction which is the subject-matter of inquiry. That exception, established in prior case law (see *Micosta SA v Shetland Islands Council* 1983 SLT 483), has been reaffirmed in a recent decision of the Inner House of the Court of Session, a decision which has in addition explored the nature of the potential liability which may fall on a law agent for losses caused to a third party as a result of complicity in his or her client's fraud.

The decision in question is [Frank Houlgate Investment Co Ltd v Biggart Baillie LLP](#) ([2014] CSIH 79, 2014 SLT 1001, [2015] PNLR 3). The relevant facts were that the defenders, a firm of solicitors, had a client who had fraudulently represented to the pursuer (an investment company) that he owned an estate in Fife worth £2.6 million. Discussions followed between the fraudster and the pursuer relating to the possibility of a joint venture to create a luxury golf development on the estate. In reality, an entirely unconnected party (whom the fraudster was impersonating) lived at and owned the estate, this individual knowing nothing of the fraudster or his deception. The defenders, to whom the fraudster had also fraudulently purported to be the owner of the estate, acting through one of their directors (a Mr Mair), prepared a standard security over the estate in favour of the pursuer, incorporating a personal bond for £300,000 in the name of the actual owner of the estate. On the strength of this security (which the fraudster executed), the pursuer advanced various sums of money to the fraudster in furtherance of the purported development of the site. The security was registered in September 2006. In January 2007, Mr Mair received information suggesting that the true owner of the estate was not his client. When Mr Mair confronted the fraudster with this information, he admitted the truth but said that he would clear matters up directly with the pursuer. On the basis of that undertaking, Mr Mair undertook not to approach the pursuer's solicitors, at least until his client had had a chance to speak to the pursuer. Later that month, the pursuer, still knowing nothing of the fraud, advanced the fraudster the further sum of £100,000. Thereafter, the fraudster fraudulently discharged the standard security.

The pursuer sought this sum of £100,000 by way of damages from the defenders. The pursuer claimed that Mr Mair, once he knew the true position, and while not intending to deceive, had acted in furtherance of his client's fraud, thereby exposing the defenders to liability to damages in delict. The defenders argued that Mr Mair had not been actively engaged in any fraud, neither was he liable for fraudulent concealment (there having been no duty of disclosure on Mr Mair's part) nor for a reckless omission. At first instance, the judge (Lord Hodge, later appointed to the Supreme Court) found the defenders liable in damages in delict to the pursuer. They, through Mr Mair, had been an accessory to fraud, because Mr Mair had failed to dissociate himself from his client's

continuing fraud by withdrawing from acting and had failed to warn the pursuer or its solicitors that they could not rely on the invalid security. Mr Mair had thereby acted in furtherance of his client's fraud, causing the pursuer to lose £100,000.

The description of what Lord Hodge thought had been the duty of Mr Mair on discovering his client's fraud is noteworthy: the first of the two mandated requirements – that Mr Mair cease immediately to act for the client – is notorious and unexceptional; the second – that he communicate either to the other party or to its legal agents that the other party “could not rely on the security” – is an injunction that might have caused surprise to some members of the legal profession. While such a statement would not expressly communicate any confidential information relating to the client to the other party, it might at least be strongly suggestive of some impropriety on the client's part. However, Lord Hodge (and, as discussed below, the Inner House) issued a useful reminder that the duty of confidentiality is inapplicable where a fraud, disclosed by a law agent's client, is one which the solicitor has wittingly or unwittingly facilitated through his conduct. Mr Mair was thus unable to rely on any alleged duty of confidentiality in relation to the admission by his client of a fraud with which he had been associated (through preparing the security documentation). This useful reminder is one of which members of the legal profession would be well advised to take note.

The defenders appealed, arguing that Mr Mair was not an accessory to the fraud as (i) he did not meet the criteria for liability as a joint wrongdoer, and (ii) there was no common design between him and the client to defraud the pursuers. The appeal court upheld the finding of the judge at first instance that the defenders were liable for the pursuer's loss, and dismissed the defenders' appeal. There was however some disagreement on the bench regarding the proper basis of liability for such loss.

Two of the three judges (Lords Menzies and McEwan) agreed with the approach of Lord Hodge that Mr Mair had been an accessory to the fraud of his client, this founding liability for the pursuer's loss. In addition, one of them (Lord Menzies) was of the view that the principal ground of liability was that Mr Mair, being under a duty of honesty towards those with whom he interacted, had made an implied, continuing representation that he did not know the information provided by his client to be untrue; when he discovered that that representation was no longer true, and failed promptly to correct it, he became liable for any losses flowing from it. This flowed from the duty of a solicitor to act honestly.

While agreeing with Lord Menzies that Mr Mair was under a duty of honesty, the third judge (Lord Malcolm) disagreed with Lord Hodge's view that the liability of the defenders could be based on Mr Mair being an accessory to the fraud of his client: a person could not make himself liable as an accessory to a crime without having, to some degree, the mental element necessary for commission of the wrong itself, and Lord Hodge had found, as a matter of fact, that Mr Mair had not been subjectively dishonest. Nonetheless, Lord Malcolm took the view that Mr Mair was liable in delict for the pursuer's loss, arguing that he was bound by the equivalent of a Hedley Byrne type assumption of responsibility on his part for the accuracy of the information provided by him.

The statements on the exception to the duty of confidentiality were, at the appeal stage, not as helpfully expressed as those of Lord Hodge at first instance. Lord Malcolm talks simply of a “fraud exception”, and Lord McEwan of the “the fraud of his client relieving [Mr Mair] of any duty of confidentiality”. Caution needs to be shown here: it is not a mere confession of a client's criminal activity which negates a solicitor's duty of confidentiality towards the client; were that so, no one could confidently seek legal advice in relation to past criminal activity without fear of its being disclosed. Lord Hodge's formulation – that what is exempted from the duty of confidentiality is knowledge of a fraud committed by a client which the solicitor has facilitated (as well as any disclosure by the client of an intention to commit criminal activity in the future) – is the more accurate formulation.

The disagreement between the judges of the Inner House of the Court of Session as to the basis of the defenders' liability is noteworthy. Lords Menzies and Malcolm agree that a solicitor comes under a duty of honesty not just to

his or her client, but also to other members of the legal profession and to the general public. This duty is described by Lord Menzies as deriving, not from the law of delict, but from an individual's position as a solicitor. It gave rise, on the facts of this case, to a "continuing implied representation" on Mr Mair's part that he was not aware of any fundamental dishonesty or fraud which might make the security transaction worthless. Lord Menzies seems to suggest that liability resting on such a basis would not be constrained by the usual limitations that would affect liability for misrepresentation arising on the basis of *Hedley Byrne*, that is, by the considerations of foreseeability, proximity, and justice, fairness and reasonableness (the *Caparo* limitations). If so, the untrammelled consequences of such a breach of honesty have the potential to be very far-reaching and onerous (one wonders whether Lord Menzies turned his mind to that issue this when reaching his decision).

Lord Malcolm's analysis of the consequences of Mr Mair's dishonesty is couched in more overtly delictual language, and is more akin to descriptions of the usual consequences of misrepresentation in delict: he says that "the case for liability is at least as strong as in *Hedley Byrne* ... the obligations flowing from Mr Mair's position as a solicitor can be seen as the equivalent of a voluntary assumption of responsibility." But Lord Malcolm does not say whether, in his view, *Caparo* type limitations on liability would apply in the case of breach of this duty, which again leaves liability in a potentially unlimited state.

The disagreement between the majority and minority on the issue of the defenders' accessory liability for fraud may be an even more significant point. Lord Menzies, for the majority, re-emphasises that there is no Scottish authority for the proposition that it is necessary for an accessory to have the same intent as the fraudulent principal. The lack of a subjective dishonest intent on Mr Mair's part was thus irrelevant: honesty had to be measured by an objective standard. An analogy with the criminal law was appropriate, and it did not matter that English criminal law differed in the approach taken to this question. By contrast, Lord Malcolm, as noted earlier, was of the view that the mental element, in some degree, necessary for commission of the fraud was required by an accessory. No clear answer to this issue is given in the older authorities: the passage from *Stair's Institutions of the Law of Scotland* concerning accessory liability gives examples of conduct which are of a more active sort than mere failure to alert another of fraud, and makes no mention of the mental state required of the accessory. Lord Malcolm raised his concerns by posing some examples concerning what is required to establish accessory liability for fraud based on an omission to do something:

"Suppose someone overheard [the fraudster] plotting his scheme? Would that person's inaction create a liability in damages to the victim? To think more generally, imagine that a user of a bank cash machine notices a suspicious device designed to steal the users' details. Does he become liable as an accessory if he fails to warn the others in the queue? In my opinion, more is needed before legal responsibility is imposed." (para 64)

These examples give rise to somewhat phantom concerns however, because the facts of the case before the court did not involve the potential for imposing accessory liability on a complete stranger to a fraudulent transaction who merely happened to learn of it; in the case before the court, Mr Mair had prepared the very legal instrument which was used to defraud the pursuer, and he had done this on the basis of information presented to the pursuer by the fraudster which Mr Mair subsequently discovered was false. One might suggest that if 'more is needed', this intimate involvement in the mechanism of the fraud should have been sufficient (as indeed it was thought to be so by the majority judges). Nonetheless, the potential consequences of this judgment for an expansion of accessory liability in delict in Scots law, especially when compared to the lack of such liability in English law, give cause for concern: the courts will require to give fuller consideration to what sorts of omission might trigger such accessory liability.

An intended appeal by the defenders against the decision of the Inner House to the Supreme Court was abandoned. While therefore this decision serves as an important reminder that a solicitor's duty of confidentiality does not extend to information regarding fraud by a client which the solicitor has wittingly or unwittingly

facilitated, the two other important matters raised in the case – a duty of honesty/duty of care as the potential basis of liability of a solicitor towards a third party, and the mental element required to be an accessory to fraud will not now be subject to what might have been useful further consideration by the Supreme Court, at least in the context of the Houlgate litigation.

[A shortened version of this blog post will appears in a forthcoming edition of the Journal of Professional Negligence]

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